Supreme Court, U.S.
FILED

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No.

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In The

SUPREME COURT OF THE UNITED STATES

1997 Term

BARBARA F. GREEN, and

STANLEY R. GREEN,

Petitioners,

-vs-

TOWN OF BROOKLINE,

Respondant.

Petition for Writ of Certiorari to the United States

Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

Barbara F. Green, Pro Se
Stanley R. Green, Pro Se
Petitioners
100 Granger Blvd. #206
Marlboro, Ma. 01752-2847
tele: (508) 460-8081

33 pp

QUESTION PRESENTED

Whether the Court of Appeals Judgment affirming the United States District Court's Dismissal of the Petitioner's Common Law actions "arising out of and during the course of " a Workmen's Compensation claim and final decision of the Industrial Accident Board was properly granted if the common law actions are not barred by the exclusivity clause of G.L. c. 152, § 24, and the statute of limitations acts a tool to void the Legislature's intent and enactment of the exclusivity clause within c. 152.

LIST OF PARTIES

The names of all parties to the proceeding in the Court of appeals whose judgment is sought to be reviewed here appear in the caption of the case.

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OPINION BELOW

A copy of the Judgment and Opinion of the United States Court of Appeals for the First Circuit, No. 96-2300, entered on April 17, 1997, is attached and hereinafter referred to as Appendix I.

JURISDICTION

On April 17, 1997, the United States Court of Appeals for the first circuit, in case no. 96-2300, affirmed the United States District Court's Order of dismissal of the petitioner's common law actions, not barred by M.G.L.A. c. 152, § 24, as barred by the Statute of Limitations.

Petitioners submit that 16 C.J.S. constitutional Law § 258 p. 1252, confers jurisdiction on this court. Jurisdiction is further based on Rule 10 (a), Supreme Court Rules, because the United States Court of Appeals for the First Circuit:

> " . . . has decided an important question in conflict with decisions by a state court of last resort and decisions of this court."

QUESTION PRESENTED

Whether the Court of appeals Judgment affirming the United States District Court's Dismissal of the Petitioner's Common Law actions "arising out of and during the courses of" a Workmen's Compensation claim and final decision of the Industrial Accident

Board was properly granted if the common law actions are not barred by the exclusivity clause of G.L. c. 152, § 24, and the statute of limitations act as a tool to void the Legislature's intent and enactment of the exclusivity clause within c. 152.

WORKMEN'S COMPENSATION PROVISIONS INVOLVED

Worker's Compensation - - 1939.11(7)

Industrial Accident Board conclusion as to compensability of injury is not to be reversed unless a different conclusion is required by law.

Worker's Compensation -- 606

A disability arises out of and in the course of employment if it is attributable to the nature, conditions, obligations or incidents of employment.

Appeal and error -- 236 (2)

Method for testing the sufficiency of a complaint is by motion to dismiss in superior court for failure to state a claim for which relief can be granted, and where no motion was filed, Supreme Judicial court would consider only whether motion to dismiss for lack of jurisdiction over subject matter was properly granted. Rules of Civil Procedure, Rule 12 (b) (1,6).

Worker's Compensation -- 2084

Common-law actions are barred by workmen's compensation statute only where plaintiff is shown to be an employee, where his condition is shown to be personal injury within menaing of compensation act, and where injury is shown to have arisen out of and in the course of employment. M.G.L.A. c. 152 §§ 23, 24, 26.

Worker's Compensation -- 2093

Employee's claim for intentional infliction of mental distress where emotional distress arose out of employment, was within workmen's compensation statute even though such emotional distress allegedly resulted from employer's willful misconduct. M.G.L.A. c. 152 §§ 23,24,26,28.

Worker's Compensation –520, 803

Unlike damages in torts, workmen's compensation is by way of relief from inability to earn, or for deprivation of support flowing from wages theretofore received by employee, and defamations, being injury to reputation, irrespective of any physical or mental harm, was not type of personal injury contemplated by Workmen's Compensation Act. M.G.L.A. c. 152 § 1 et seq.

Malicious Prosecution –14

Any physical or mental harm is incidental to malicious prosecution, and is not indispensable ingredient of the tort.

Worker's Compensation – 2090

Key to whether workmen's Compensation Act precludes common-law right of action lies in nature of injury for which plaintiff makes claim, not nature of act which plaintiff alleges to have been responsible for injury. M.G.L.A. c. 152, §§ 1 et seq. 15,23.

Worker's Compensation – 502, 608

Workmen's Compensation Act protects employee only to extent that his injury arises out of nature, conditions, obligations or incidents of employment, and alleged violation of employee's civil rights is not personal injury arising out of and in course of employment which would be compensable under the Act. M.G.L.A. c. 151B, §§ 4, 9,c. 152, §§ 23,26.

Worker's Compensation -- 2144

Workmen's Compensation does not bar spouse's claim for loss consortium, alienation of affection and society, Winsmore v Greenback, Wills Rep. 577, 1745.

Statement of the Case

On December 10, 1986, the petitioner, Barbara f. Green, "employee", was demanded to sign a pre-written letter of resignation by her employer, Town of Brookline. The employee refused and was immediately suspended pending termination proceedings.

On January 27, 1987, the employee was terminated from her employment as the result of a **retaliation generated termination.** The employee made a timely appeal to the Civil Service Commission, case no. D-2847, DALA # CS-87-555. On October 16, 1987, the Civil Service Commission entered a decision affirming the termination of the employee. The employee made a timely judicial review of the Civil Service Commission decision in the Dedham District Court, Dedham, Ma., case no. 23869.

February 1988, the employee made application to the Town of Brookline for refund of her entitled retirement funds. On March 8, 1988, Cathleen Cavell, former Associate Town Counsel, held that, if Mrs. Green were to voluntarily dismiss her state court lawsuits, she would then release the retirement funds. By obtaining that voluntary dismissal, the Town of Brookline and Civil Service Commission were insulating themselves form a claim of **retaliation generated termination.** Gates v Life of Montana Insurance Co., 69 P. 2d 213, 216, No. 82-468 (1983)

June 1988 the employee voluntarily dismissed her lawsuits through her attorney John Silvia, Jr., Fall River, Ma. November 27, 1988, the employee filed a Workmen's Compensation claim for (1)

DeQuervanes disease of the right wrist and (2) the employer intentionally inflicted emotional distress upon her in an attempt to force her to resign after she discovered improper actions on the part of her employer.

July 1990, David Turner, Town Counsel, telephoned the employee's attorney, William Long, Fall River, Ma., and stated, he had found "notes" in his associate's (Cathleen Cavell) files and if the workmen's compensation case goes to trial, he would introduce them.

Mr. Turner, was asked, if, these "alleged notes" had been introduced at the Termination or Civil Service hearings. Mr. Turner replied, **No, did not want to upset the husband.** A pretext to gain an advantage in a civil matter. Violations of Dr 7-102 and DR 7-105. See . . Mays v Williamsons & Sons, 84-2418, U.S. App 8th Cir., 1985.

A failure to assert key facts when it would be natural to assert them amounts to a positive assertion of the non-existence of the facts. People v Weinstein, 213 N.E. 2d 115, I11. App.1965.

October 1990, Romm A.J., denied the employee's G.L. c. 152 claim and the employee made a timely appeal. Thereafter, there became a communication break-down between the Greens and Mr. Long, evidenced by Mr. Long's withdrawal from this case in January 1991.

February 1991, the Green's retained Jonathan Levin, Attorney, Boston, who appeared at conference on or about March 14, 1991, to obtain the employee's records for his review. Upon leaving

Conference, Sarah Wilson, former Associate Town Counsel, handed Mr. Levin the "alleged notes" and stated, if this case goes to trial I will introduce these with a witness to testify to them. Thereafter, Mr. Levin declined to take this case.

March 30, 1991, the employee's spouse filed Motion for Order for Compensation Payments. April 5, 1991, the employer filed Opposition to the Motion stating, the employee appealed the denial of her G.L. c. 152 claim. All other causes of action and claims set forth in her motion are not within the jurisdiction of the Department.

And ruling on the Motion for Order was deferred pending all evidence in this case had been entered.

Thereafter, the employee's spouse was authorized to act as Legal Representative (452 CMR 1.18 (2) and filed a Motion for the Production of the employer's psychiatrist's records, files, notes, and otherwise. Upon receipt of the records it was found, that, Cathleen Cavell, former Associate Town Counsel, had presented Stephen Heisel, M.D. with the "alleged notes together with a witness to testify to them to influence Stephen Heisel's examination and report against the employee.

The Administrative Judge appointed an impartial physician from the roster established by new section c. 10, § 10.4, § 7.16. An Administrative Judge may appoint an impartial physician from this panel to examine the employee and report, and the findings will be prim facie evidence. And the impartial physician found casual connection with the employment of the employee and her mental disability.

This case then proceeded to trial on January 5, 1993,February 9, 1993, April 5, 1993, April 6, 1993, May 10, 1993, May 12, 1993 and July 7, 1993, with the decision being entered April 8, 1996. And it was determined as a matter of fact, that, the employee suffered a mental disability as a result of a series of stressful events within the workplace and incidents that were not a bona fide personnel actions.

It is submitted, that, the employee's mental disability was intentionally inflicted by the inaction's of the Civil Service Commission and Officials of the Town of Brookline knowingly permitting individuals to resort to acts of doing justice to themselves knowing they could not obtain justice by any other means and for the sole purpose to justify themselves with the termination of the employee. In other words, the employee was a victim of a **retaliation generated termination.**

REASON FOR GRANTING THE WRIT

The judgment and Order of the United States Court of Appeals affirming the United States District Court's Dismissal of the Petitioner's Common Law Actions was Improperly Granted because the Statute of Limitations is Outside the Obvious Intent of there Exclusiveness Clause of M.G.L.A. c. 152 and the Statute of Limitations Can Not Be Used To Void the Legislature's Intent and Enactment of the Exclusivity Clause Within M.G.L.A. c. 152.,

1. On April 8, 1996 the Industrial Accident Board found that the employee developed a mental disability as a result of a series of stressful events in the workplace and incidents that were not bona fide personnel actions. Thereafter the Petitioners brought common-

law actions before the United States District Court to recover damages for injuries not compensable under G.L. c. 152 § 26, and common law actions for such injuries, therefore were not barred by the exclusivity provision of G.L. c. 152, § 24.

2. Retaliation generated termination's are those resorted to by employers, employment agencies and labor unions doing justice to themselves knowing they can not obtain justice by any other means and by the adoption of forcible measures and most generally the end result being termination of the employee.

3. To be the basis of a charge of retaliation generated termination, the actions must contain three essential elements: (1) individual liability,[1] (2) intentional infliction of emotional distress, and (3) constructive discharge.

4. The Petitioners challenge the lawfulness of the Statute of Limitations to bar common law actions for claims not compensable under G.L. c. 152, § 26, and common law actions for such claims, therefore, are not barred by the exclusivity clause of G.L. c. 152 § 24, as being outside the obvious intent of the exclusiveness clause and can not be used as a tool to void the Legislature's intent and enactment of the exclusivity clause into Workmen's Compensation Act. G.L. c. 152.

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[1] **Defamation, Fraud, False Imprisonment, Malicious Prosecution, Coercion, Invasion of the Right to Privacy, Loss of Consortium, Alienation of Affection and society of Husband and wife, Seduction, assault, False arrest and Kindred tortious acts. Madden's case Supra at 492. Cf. Zygmuntowicz v American Steel and Wire Co., 240 Mass. 421 (1922).**

5. The defendant's motion to dismiss was properly granted, if, the statute of limitation is inside the exclusivity clause of G.L. c. 152, and the petitioner's claims are compensble under G. L. c. 152, §26. M.G.L.A. c. 152, § 24, as amended through St. 1955, c. 174, § 5.

6. The method for testing the sufficiency of the complaint is by way of motion to dismiss for failure to settle a claim for which relief can be granted or by motion to dismiss for lack of subject matter jurisdiction. **No such motions were filed below.**

7. The respondents argue that the petitioner's common-law actions for damages not compensable under G.L. c. 152, § 26, and arising out of and during the course of a Workmen's Compensation claim are barred by the statute of limitations.

8. First, the petitioner's complaint and record must show that at the time their injuries were sustained by virtue of the defendant's conduct, the employee must be found to be an employee before compensation may be had under the Act. (Harvey' Case, 395 Mass. 300 (1936). And the Administrative record is clear, the employee was an employee at all times.

9. The controlling argument must be that the essence of the tort is not physical or mental injury, but interference with the right to be free from injuries to character or reputation. W. Prosser, Torts, §119, at 834 (4th ed. 1971), any physical or mental harm is incidental, and is not an indispensable ingredient of the tort. See Larson, supra at §68.31.

10. An employee is entitled to compensation under G.L. c. 152, §26, where his or her injury-whether physical or emotional -arose

"out of and in course of " employment. Zerofski's Case 385 Mass. 590, 592 (1982), quoting Caswell's Case, 500, 502,(1940). The responsibility for separating injuries that are work-related from those that are not rests with the Industrial Accident Board which must determine as a matter of fact whether causal connection exists between employment and injury. Zeroski's Case, supra at 594. See Mahoney's Case, 337 Mass. 629, 632 (1958). A decision upon the question of causation was.. within province of the Board to determine. On judicial review the findings of the reviewing Board must be accepted as final unless they are wholly lacking in evidential support or tainted by error or law. Korsun's Case, 354 Mass. 124, 125(1968), and cases cited. and particular deference is given to the agency's interpretation of its governing statute where "the statute itself vests broad powers in the agency to fill in the details of the legislative scheme. Amherst Pelham Regional School Comm. v Department of Educ., 376 Mass. 480, 492(1978.)

11. Where employees have received compensation for mental or emotional disorders caused by work related trauma the courts relied on the findings by the Board that the injury resulted from a "single traumatic event... a stress greater than the ordinary stresses of everyday work or a series of "stressful work-related incidents. "Albanese's Case, 378 Mass. 14, 18 n.4(1979). See Foley v Polaroid Corp., 381 Mass. 545, 550(1981)

12. With respect to the claim for intentional infliction of mental distress, the employee recognizes that emotional distress arising out of employment was/is a personal injury under the Act If an employee

is incapacity by mental or emotional disorder causally related to a series of stressful work-related incidents the employee is entitled to compensation. Albanese's Case, supra at 14-15. Fitzgibbon's Case,374 Mass. 633 (1978). Therefore, common-law actions for such claim are barred by the exclusivity provision of G.L. c. 152, §24.

13. Now looking at the employee's individual liability claims against the employer to determine whether they are compensable under the Act. I has been long recognized that the general term "personal Injury" encompasses wrongs which would not be personal injuries under the workmen's Compensation Act. Madden's Case, 222 Mass. 487, 492(1916); Madden's Case cites the following examples of personal injuries which would not be compensable under the Act: "injuries to reputation resulting from libel, Thompson v Judy, 95 C.C.A. 51, 54(1909); malicious prosecution and false imprisonment, McChristal v Clisbee, 190 Mass. 120(1906); invasion of the right to privacy, Riddle v MacFadden, 210 N.Y. 215(1911); as well as the alienation of affection of husband and wife, seduction, false arrest and kindred tortuous acts. Madden's Case, supra at 491. CF. Zygmuntowicz vAmerican Steel & Wire Co., 240 Mass. 421(1922).

14. The employee's claim for injuries to reputation are not the type of personal injuries contemplated by G. L. c. 152. In so concluding, the lack of relationship between the kind of injuries covered by the act and the injuries involved here. The Act has been interpreted to encompass physical and mental injuries arising out of

employment,, where the gist of an action for individual liability is injury to reputation, irrespective of any physical or mental harm.

15. Citing the statute of limitations to block the main thrust of this action because of peripheral items of damages, when the compensation claim could not purport to give relief for the main wrong of the injury to reputation, would be incongruous, and outside the obvious intent of the exclusiveness clause. See 2A A. Larson, Workmen's Compensation §68.33(1976 & Supp. 1979). Ahmed's Case, 278 Mass. 180, 183 (1932); Ferriter v Daniel O'Connelll's Sons, supra L. Locke, Workmen's Compensation §9, at 11(1968),; G.L. c. 152, §23. Cf. G.L. c. 152, §15.

16. At this point the distinction between the employee's claims for individual liability and constructive discharge on the one hand, intentional infliction of mental distress on the other hand, becomes clear: mental harm is the essence of the tort of intentional infliction of mental distress; it is an indispensable element of the tort. I matters not that all claims are based upon the same alleged conduct of the employer for "the key to whether Workmen's Compensation Act precludes common-law rights of action lies in the nature of the defendant's act which the petitioners allege to have been responsible for the injuries. Gambrell v Kansas City Chief's Football Club, Inc., 562 S.W. 2d. 163, 168 (Mo App. 1978).

17. With respect to the employee's claim her civil rights were violated. Constructive discharge occurs when employers, employment agencies and labor unions permits conditions of discrimination and permit individuals to resort to acts to do justice to

themselves knowing they can not obtain it by any other means and by the adoption of forcible measures. Constructive discharge is injury to reputation and the positive intent to injure or annoy another person and deprive a person of his rights, irrespective of any physical or mental harm, therefore, the employee's civil rights claim is not the type of injury contemplated by G.L. c. 152, and is not compensable under G.L. c. 152, §26, and the employee's common law action for such injuries are, therefore, not barred by the exclusivity provision of G.L. c. 152 §24. And constructive discharge is a Title Seven violation with federal district courts holding original jurisdiction, thereof.

18. With respect to the employee's claim against her employer's Counsels for coercion, The U.S. Court of Appeals decision, P. 3., para. 2, is in conflict with the decision of this court in the area of coercion. Petitioners Brief p. 22, para 23, para 95, 96. Fay v Noia, U. S. 391, 9 L. Ed 837, 83 S. Ct. 822 (1963). Reck v Pate. Coercion is a positive intent to deprive a person of his freedom of will and unconstitutionally allow society to the use of a decision that may be untrue, irrespective of any physical or mental harm. And the employee's complaint against her employer's Counsels use of created evidence to gain advantages in civil matters falls within this area of coercion.

19. The controlling argument must be the essence of the tort is not physical or mental injury but interference with a persons freedom of will and the use of society to a decision that may be untrue. W. Prosser, Torts, §119, at 834 (1976 & supp. 1979). Any p physical or mental harm is incidental, and is not an indispensable ingredient of

the tort. see Larson, supra at § 68.31. At this point the distinction between the employee's claims against her employer for coercion and using created evidence to gain advantages in civil matters on the one hand, intentional infliction of mental distress on the other hand, becomes clear: mental harm is the essence of the tort of intentional infliction of mental distress; it is an indispensable element of the tort. Gambrell v Kansas City Chief's Football Club, Inc., 562 S. W. 2d 163, 186 (Mo. App. 1978).

20. It is submitted, that, the petitioner's common-law actions against the employer for damages not contemplated as personal injuries under the Workmen's Compensation Act and not compensable under G.L. c. 152, §26, did not accrue until on April 8, 1996, the date the Industrial Accident Board determined as a matter of fact, that casual connection existed between employment and the employee's mental disability, resulting form a series of stressful events within the workplace and incidents that were not bona fide personnel actions.

21. Not withstanding, the use of the statute of limitations to block the main thrust of these acclaims and actions, arising out o f and during the course of a Workmen's Compensation claim for intentional infliction of mental distress, because of peripheral damages, would be incongruous, and outside the obvious intent of the exclusiveness clause of M. G.L. A. c. 152, §24. See 2A A. Larson Workmen's Compensation §68.33 (1976 & Supp. 1979). And the statute of limitations would act as a tool to void the Legislature's intent and enactment of the exclusivity provisions of G.L. c. 152.

22. The statute of limitations may afford blockage of common law actions on direct review of a termination proceeding filed after the three year limit, but this must be free from any Workmen's Compensation claim. Under Workmen's Compensation claims related to stress, a person may suffer a heart condition after five years from the date of injury, among other causes.

23. The responsibility for separating injuries that are sufficiently work-related from those that are not rests with the Industrial Accident Board, which must determine as a matter o fact whether causal connection exists between employment and the injury. Therefore, no common law actions may be maintained against an employer until or after the Industrial Accident Board has determined as a matter of fact the employee's mental disability as a result of a series of stressful events within the workplace and incidents that were not bona fide personnel actions.

CONCLUSION

24. The Appellee's motion to dismiss the Petitioner's common law actions in the District Court, as time barred, can only be properly granted and affirmed if the Petitioner's actions are on direct review and appeal to the Termination proceedings dated January 27, 1987, and Civil Service Commission proceedings dated October 16, 1987.

25. **This is not the case here today. This action arises out of and during the course of a Workmen's Compensation claim.**

26. Workmen's Compensation Act, G.L. c . 152, §24, as amended through St. 1955, c. 174, §5, states in pertinent part: "An employee shall be held to have waived his right of action at common

law or under the law of any other jurisdiction in respect to an injury therein occurring, to recover damages for personal injuries if he shall not have given his employer, at the time of his contract oh hire, written notice that he claimed such right. . ." Barbara Green does not assert that she gave the Respondent notice of her rights under the compensation act, but rather that his injury is not covered under the act. Common law actions are barred only where the plaintiff is shown to be an employee: his condition is shown to be a "personal injury" within the meaning of the compensation act; and the injury is shown to have arisen "out of and in the course of . . .employment" G.L. c. 152, §26. L. Lock, Workmen's Compensation §651, at 763 (1968).

27. The Court of Appeals and District Court have each errored, on that part, that: the petitioner's claims against the Appellee for **retaliation generated termination** "arose out of and in the course of " an appeal on the October 1990, decision of Romm, A.J., that denied the employee's G.L. c. 152 claim and a decision of the Industrial Accident Board entered April 8, 1996, which determined as a matter of fact there was causal connection between the employee's employment and mental disability. That the employee suffered a mental disability as a result of a series of stressful events in the workplace and incidents that were not bona fide personnel actions.

28. The Court of Appeals and the District Court have each errored on that part, that:

Retaliation generated termination's must contain three essential elements:

(1) individual liability, (2) intentional infliction of emotional distress, and (3) constructive discharge.

29. The employee's claim against her employer for intentional infliction of emotional distress is a personal injury within the meaning of the Workmen's Compensation Act and therefore is compensable under G.L. c. 152, §24.

30. The petitioner's claims for individual liability and constructive discharge are not personal injuries within the meaning of the workmen's Compensation Act and are not compensable under G.L. c. 152, §26, and the petitioner's common law actions for such claims are, therefore, not barred by the exclusivity clause of G. L. c. 152, §24. And the statute of limitations can not be used as a tool to void the Legislative intent and enactment of the exclusivity provisions of Workmen's Compensation Act, G.L. c. 152.

31. Therefore, the Appellee's motion to dismiss in the District Court, affirmed in the U.S. Court of Appeals for the First Circuit were improperly granted and deprived the petitioner's of their common law rights to sue the employer for claims that accrued "out of and in the course of" a Workmen's Compensation claim for **intentional infliction of emotional distress**, and whose rights are not barred by the exclusivity clause of G.L. c. 152, §24.

32. For the foregoing reasons and conditions, the petitioners respectfully urge this Honorable Court to grant their petitioner and issue a Writ of Certiorari to the United States Court of Appeals for the First Circuit and thereafter reverse the Order of Dismissal in the

District Court and the petitioner's be entitled to pursue their common law actions and claims accrued under G.L. c. 152.

Barbara F. Green

Barbara F. Green, pro se

Stanley R. Green

Stanley R. Green, pro se
100 Granger Blvd. #206
Marlboro, Ma. 01752-2847
tele: 508-460-8081

No.

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SUPREME COURT OF THE UNITED STATES

1997 Term

BARBARA F. GREEN, and

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Petitioners,

-vs-

TOWN OF BROOKLINE,

Respondant.

AFFIDAVIT OF SERVICE

We, Barbara F. Green & Stanley R. Green, petitioners in the foregoing petition hereby certify we have this ~~20th~~ 28 day of ~~June~~ July 1997, served two copies of the foregoing petition upon Joslin Ham Murphy, associate Town Counsel, for the Appellee, at 333 Washington Street, Brookline, MA. 02146, by certified mail, return receipt requested, postage prepaid.

Barbara F. Green

Barbara F. Green, pro se

Stanley R. Green

Stanley R. Green, pro se
100 Granger Blvd. #206
Marlboro, Ma. 01752-2847
tele: 508-460-8081

(NOT FOR PUBLICATION)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-2300

BARBARA F. GREEN AND STANLEY R. GREEN,

Plaintiffs, Appellants,

v.

TOWN OF BROOKLINE,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

(Hon. William G. Young, U.S. District Judge)

Before

Selya, Cyr and Boudin,
Circuit Judges.

Barbara F. Green and Stanley R. Green on brief pro se.
Joslin Ham Murphy on brief for appellee.

April 17, 1997

Per Curian. Appellants Barbara F. and Stanley R. Green filed a complaint in the Massachusetts district court. The complaint challenges the treatment Mrs. Green received at the hands of her employer, the Town of Brookline, and cites two bases of jurisdiction: (1) 42 U.S.C. § 1983; and (2) Title VII, 42 U.S.C. §§ 20000e-3 and 2000e-5. The district court dismissed the complaint due to the expiration of the statute of limitations. We affirm.

. We agree with the district court that appellants' § 1983 claims are time-barred. "Local law determines the limitations period for section 1983 claims." Morris v. Government Dev. Bank of Puerto Rico, 27 F. 3d 746, 748 (1st Cir. 1994). We thus Look to the three-year Massachusetts statute of limitations for personal injury actions. Street v. Vose, 936 F. 2d 38, 39 (1st Cir 1991) (per curium) (citing G.G.L. c. 260, § 2A). When the cause of action accrued, however, is a federal question. Id. at 40. In a case such as this, "the statute of limitations begins to run when the plaintiff learns of the decision to terminate (her) employment . . . . " Rivera-Muriente v. Agosto-Alicea, 959 F. 2d 349, 353 (1st Cir. 1992).

Mrs. Green learned that the Town had decided to terminate her on December 10, 1986. This lawsuit, filed over nine years after this date, plainly is late. The same conclusion results even if we consider the Town's threats to use certain notes in evidence in the workers' compensation case. According to the complaint, these threats were first made in 1990. Because this is about six years prior

to the initiation of the instant action, the complaint also is time-barred in relation to these later charges.

Finally, appellants present no reason to toll the running of the limitations period. Even assuming that the attorney for the Town coerced Mrs. Green into dismissing her court case appealing the decision of the Civil Service Commission, this occurred in 1988. There simply are no factual allegations that the Town or any one acting on its behalf did anything to prevent appellants from filing the present lawsuit. See Pahlave v. Palandjian, 809 F. 2d 938, 942-43 (1st Cir 1987) (in the absence of specific factual allegations, a plaintiff cannot claim that duress tolls the statute of limitations).

2. Title VII has two deadlines which are in issue in this case. First, an individual in a state such as Massachusetts - - a "deferral" state with its own civil rights law and agency -- must file a complaint with the Equal Employment Opportunity Commission (EEOC) within 300 days after the "alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5 (e). See also Lawton v State Mut. Life Assurance Co., 101 F 3d 218, 221 (1st Cir 1996). Second, the individual must file an action in the district court within 90 days of receiving a right to sue letter from the EEOC. 42 u.s.c. § 2000E-5 (F).

"In actions brought under Title VII . . . a plaintiff must plead affirmatively performance of the conditions precedent to filing a lawsuit." 2AJ. Moore, Moore's Federal Practice ¶ 9. 04, at 9-65 (2d ed. 1996) (footnote omitted); Jackson v. Seaboard Cost Line R.R. Co., 678 F 2d 992, 1010 (11th Cir 1982). Under fed. R. Civ. P. 9,

which governs the pleading of special matters, "it is sufficient to aver generally that all conditions precedent have been performed or have occurred. " Fed. R. Civ. P. 9 (c)

However, our review of the record reveals that plaintiffs never met their burden of alleging general compliance with Title VII's filing requirements. That is, they never stated their complaint, in their responses to the Town's motion to dismiss, or even in their briefs on appeal, that they filed the federal complaint within 90 days of receiving a right to sue letter. Further, the record does not contain any documents from which such inferences can be drawn.

The judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No: 96-11252-WGY

GREEN
Plaintiff

v.

TOWN OF BROOKLINE
Defendant

ORDER OF DISMISSAL

YOUNG, D.J.

After a hearing held on THURS., OCT. 10, 1996, this Court Orders that Defendant's Motion to Dismiss is llowed and the above entitled action be and hereby is Dismissed

Robert J. Smith, Jr.
Clerk

By s" _____
Deputy Clerk

October 10, 1996

Notice mailed to counsel of record.

Supreme Court, U.S.
FILED
AUG 27 1997
CLERK

No. 97-158

In The

Supreme Court of the United States

October Term, 1996

BARBARA F. GREEN and STANLEY R. GREEN,

Petitioners,

vs.

THE TOWN OF BROOKLINE, MASSACHUSETTS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DAVID LEE TURNER*
JOSLIN HAM
333 Washington Street
Brookline, MA 02146
(617) 730-2190

Counsel for Respondent

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the judgment of the United States Court of Appeals for the First Circuit affirming an Order of the Massachusetts District Court dismissing the petitioner's complaint was proper.

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STATEMENT OF THE CASE

In 1996, the petitioners, Mr. and Mrs. Green (hereinafter, the "Greens"), filed a complaint at the Massachusetts District Court alleging that the respondent, the town of Brookline, Massachusetts (hereinafter, "Brookline") wrongfully terminated Mrs. Green from her employment in 1987. Brookline moved to dismiss the complaint on the ground that the petitioners' complaint was time-barred. After a hearing, the District Court entered an Order of Dismissal. *Petition, App. 1 at 25.*

The Greens subsequently petitioned the United States Court of Appeals for the First Circuit to review the Order of Dismissal. In support of their petition, the Greens raised two issues. First, they asserted that the Order dismissing their complaint was proper if their claims were barred by the exclusivity provision of the Massachusetts Workers' Compensation Act; second, they argued that the statute of limitations should be set aside on the ground that Mrs. Green was wrongfully coerced into voluntarily dismissing her appeal of a Massachusetts Civil Service Commission decision affirming Brookline's termination of her employment in violation of her Constitutional Rights.

On April 17, 1997, the United States Court of Appeals for the First Circuit affirmed the District Court's Order of Dismissal on the grounds that the Greens' complaint was time-barred and because it failed to allege compliance with the Title VII filing requirements. *Petition, App. 1 at 21.* The Greens seek this Court's review of the judgment of the United States Court of Appeals.

The Facts.

The town of Brookline hired Mrs. Green as a civil service, Junior Clerk Typist in Brookline's Department of Veterans' Services in July, 1978. After a course of progressive disciplinary action, Mrs. Green was terminated from her employment in 1987. Mrs. Green appealed Brookline's decision to terminate her at the Massachusetts Civil Service Commission, the state administrative agency that is charged with reviewing such decisions. The Civil Service Commission upheld Brookline's decision to terminate Mrs. Green.

In 1989, the Greens filed a workers' compensation claim at the Massachusetts Department of Industrial Accidents, the state administrative agency that is charged with reviewing such claims. By their claim, which was brought under the provisions of Massachusetts General Law Chapter 152, the so called Massachusetts Workers Compensation Act, the Greens alleged that Mrs. Green was disabled from work as a result of the events leading up to and including her termination from work in 1987. In April, 1996, the Department of Industrial Accidents issued a decision and Order, finding that Mrs. Green was disabled from work from January 27, 1987 through December 16, 1991. Brookline's appeal of the decision and Order is pending before the Massachusetts Department of Industrial Accidents.

In June, 1996, the Greens filed a forty-seven page complaint[1] at the Massachusetts District Court alleging

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[1] Prior to filing their 1996 complaint, the Greens filed a number of earlier claims alleging that Mrs. Green was

that Brookline discriminated and retaliated against Mrs. Green during her employment in Brookline; that Brookline wrongfully terminated Mrs. Green from her employment; that Brookline's attorneys wrongfully withheld and/or used certain evidence against Mrs. Green during the course of the proceedings before the Massachusetts Department of Industrial Accidents; and that Mr. Green suffered a loss of consortium in his marriage on account of Brookline's allegedly wrongful conduct in connection with such evidence.

REASONS FOR DENYING THE WRIT

It is undisputed that Mrs. Green was terminated from her Brookline employment in 1987. The petitioners' 1996 complaint was brought some nine years later, and,

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wrongfully terminated from her Brookline employment. In 1987, they filed a complaint at the Massachusetts Commission Against Discrimination alleging that Mrs. Green was discriminated against in her employment; in 1987, they filed a complaint at the District Court Department of the Massachusetts Trial Court seeking review of the decision of the Massachusetts Civil Service Commission upholding Brookline's termination of Mrs. Green from her employment; in 1988, they filed a complaint at the Massachusetts District Court seeking review of the decision of the Massachusetts Civil Service Commission upholding Brookline's decision to terminate Mrs. Green from her employment; and, in 1991, the Greens filed a complaint at the Massachusetts District Court seeking review of Brookline's decision to terminate Mrs. Green from her employment and of the Massachusetts Civil Service Commission's decision upholding such termination. All of these claims were either unsubstantiated, or dismissed.

because it was time-barred, it was properly dismissed. The judgment of the United States Court of Appeals affirming the dismissal was plainly correct.

A distillation of the Greens' petition, however, reveals what appears to be at the bottom of the petitioners' argument in support of review: they suggest that the statute of limitations for their employment discrimination claims that are not covered by the Massachusetts Workers' Compensation Act should be tolled until the date upon which the decision and Order of the Department of Industrial Accidents was issued. If this argument is properly taken, it is without merit. "The pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the limitations period." *Ombe v. Fernandez*, 914 F. Supp. 782, 788 (1st Cir. 1996), *citing Electrical Workers v. Robbins & Meyers, Inc.*, 429 U.S. 229, 97 S. Ct. 441, 50 L. Ed. 2d 427 (1976).

Moreover, even if the petitioners were to argue that they were unable to meet the filing deadline because of Mrs. Green's disability from work, this argument also fails, as the presently unresolved decision and Order of the Massachusetts Department of Industrial Accidents determined that Mrs. Green's disability from work terminated in December, 1991, some five years before the Greens filed their 1996 District Court complaint.

Finally, contrary to the Greens' assertion, the judgment of the United States Court of Appeals for the First Circuit is not in conflict with a decision of any other court of last resort. "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition . . . will be granted only for compelling reasons." *Sup. Ct.*

R.10. In the instant case, even the most liberal interpretation of the petition fails to point to any such compelling reason. Simply stated, the gate has been shut, and there is no reason to re-enter the garden.

CONCLUSION

For the foregoing reasons, the respondent town of Brookline respectfully states that the Petition for Writ of Certiorari should be *Denied*.

Respectfully submitted,

DAVID LEE TURNER*
JOSLIN HAM
333 Washington Street
Brookline, MA 02146
(617) 730-2190
Counsel for the Respondent

**Counsel of Record*

Dated: August 27, 1997.

Supreme Court, U.S.
FILED
SEP 27 1997
CLERK

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NO. 97-158

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

BARBARA F. GREEN, AND

STANLEY R. GREEN,

Petitioners,

-VS-

TOWN OF BROOKLINE,

Respondents.

3

On Petition for Writ of Certiorari to The
United States Court of Appeals forThe
First Circuit

REPLY TO RESPONDENT'S OPPOSITION

Barbara F. Green, Pro
Stanley R. Green, Pro
Petitioners
100 Granger Blvd. #206
Marlboro, Ma. 01752
Tele: 508-460-8081

15 pp

QUESTION PRESENTED

MASSACHUSETTS GENERAL LAW C. 151B AND ITS FEDERAL COUNTERPART ARE UNCONSTITUTIONAL BECAUSE THEY DEPRIVE AN EMPLOYEE OF ENTITLED COMMON LAW TORT ACTIONS ARISING OUT OF AND DURING THE COURSE OF A WORKMEN'S COMPENATION CLAIM AND VIOLATE APPELLANT's HUMAN RIGHTS.

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Everyone has the right to life, liberty and security of person.

HUMAN RIGHTS ART. 5

No one shall be subjected to torture, inhuman degrading treatment or punishment.

HUMAN RIGHTS ART. 8

Everyone has the right to an effective remedy by the competent national tribunal for acts violating the fundamental right granted him by the constitution or by law.

HUMAN RIGHTS ART. 11

Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.

HUMAN RIGHTS ART. 23

(1) Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against umemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

28 U. S. C. § 1391

Hurley v Reed,
110 U.S.APP. D.C. 32, 288 F. 2d 844(1961)

Moore v Federal Department Stores,
33 Mich App. 556, 190 N.W. 2d, 46 ALR 3d
1275, Amended MCLA 8411.4(Stat. ANN 1968 §17.144.

Markham v Pittsburgh Plate Glass Co.,
(WD Mich 1969) 299 Supp. 240

Ford v Revlon, Inc.
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Ariz. Sup. Ct. 1987.

Satterwhite v Smith,
36 F.E.P. Cases 148, 9th Cir. 1984

Gates v Life of Montana Ins. Co.,
668 P 2d 213, 216, No. 82-468, 1983

In re Bunston,
32 Montana 83, 155 P 1109, 1916

I THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION.

16 C.J.S. Constitutional Law §258, p. 1252, states in pertinent part:

"Conditions precedent to the maintence of causes of action that have already accrued may be imposed by the legislature, where the requirements operate only as reasonable restrictions on the exercise of the right to sue, but not where they operate as a denial or abridgement of existing rights. Statutes imposing conditions precedent to the maintence of an action or proceeding do not create vested rights, and statutes removing such conditions precedent may operate retrospectively without interfering with vested rights, as they effect the remedy only."

FURTHER, jurisdiction is based on 28 U. S. C. §1391

"Because of the restrictive reach of the federal venue statute 28 U. S. C. §1391, when Hurley v Reed, 110 O.S. App. D.C. 32, 288 F. 2d 844(1961) was decid ed, the practical effect was to have our District Courts to entertain such actions.

This case invloves the validity of the statute of limitations barring common law tort claims against an employer an employer 'arising out of and during the course of' a Workmen's Compensation claim wherein long delays occur and wherein it has long been recognized that "[m]uch of the responsibilty for separating injuries that are sufficiency work-lated from those that are not rest with the Industrial Accident Board, which must determine as a matter of fact whether a causal connection exists between employment and injury." The Massachusetts Legislature created a roster of impartial physican from which

the Judges could choose from and have the employee examined and the findings become primia facie evidence. **Moore v Federal Department Stores,** 33 Mich App 556, 190 NW2d 262, 46 ALR3d 1275, amended, MCLA §411.4(Stat Ann 1968 Rev §17.144). **Markham v Pittsburgh Plate Glass Co.,** (WD Mich 1969), 299 F. Supp 240. Reversed and remanded.

On April 8, 1996, after long delays, the Department of Industrial Accidents determined as a matter of fact, the employee suffered a mental disability as the result of a series odf stressful events in the owrkplace and incidents that were not bona fide personnel actions. The employee was not paid any compensation payments until April 8, 1996, when the Town of Brookline was ordered to do so. And the employee was not aware here compensation payments were discontinued in December 1991, until on April 8, 1996, and has filed a section 34A claim for total and permanent disability.

Thereafter, the Appellants brought Common Law tort actions before the U.S. District Court for the District of Massachusetts and the District Court granted the Petitioner's Motion to dismiss as time barred. the Appellant's appealed to the U.S. Court of Appeals for the First Circuit and the Appeals Court affirmed the District court's Dismissal. And the Petitioners have have appealed that decision.

Respondents state the Petitioners claims should fail That is erroneous, frivolous and without merit. The Equal employment Opportunity Commission, Massachusetts Commission Against Discrimination and the State Civil Service Commission, all, lack jurisdiction to decide work and non-work related injuries. That is the exclusive function of the Industrial Accident Board and that did not occur until on April 8, 1996, in this case at bar.

Petitioners can not bring Common Law Tort claims against the employer until on or after the date the Industrial Accident Board determines as a matter of fact, that, the injury suffered by the employee was causally work related, this case April 8, 1996.

I THE FINDINGS OF THE INDUSTRIAL ACCIDENT BOARD MUST BE ACCEPTED AS VALID AND FINAL UNLESS LACKING IN EVIDENTIAL SUPPORT OR TAINTED BY LAW OR ERROR.

Human Rights and freedoms, such as set forth in the Universal Declarattion of Human Rights, not restricted or prohibited by the Consitution or Laws of the United States(the United States being a Member State, in the fulliest agreement with the General Assembly, has agreed to accept Human Rights on their Merits) **can not** be impaired by the wrongful acts of individual unsupported by some form of Resolution, National or Internation law, statute or otherwise... a person may, by force or fraud, interfere but un-

less protected by some shield of resolution or law, he can not injure or destroy the right...he will only render himself amenable to the laws of the terrority wherein the cause arose.

The undisputed material facts are contained in the employee's official personnel folder(OPF) and her official medical folder(OMF) and can be summarized as follows:

The employee was hired in July 1978, as a G2 Jujior Clerk Typist. In the year 1980, as the results of the inability of the new hire which replace the resigned Senior Clerk G5, Elaine Gammerman , the employer divided, assigned and required the G@ Junior Clerk to perform one half of her duties monthly. And the employer continued to pay the Senior Clerk G5, her full salary and for work being performed by the Junior Clerk. A positive assertion of **Breach of Implied Contract and Covenant of good faith and fair dealing and the Equal Pay Act. Human rights Art. 23(2)**

The employee worked from July 1978 ti July 1985, without incident. On July 30, 1985, the employee received her first reprimand and then only after she had reported veterans were bringing back to be given to Alfred Hallenbrook, Director of Veterans Services, as payment on loans he had made to them and because Mr. Hallenbrook was not taking

returning the cash to the Treasure's Office on a timely basis.

July 1985, Hallenbrook and Kundo brought in a privately owned home computer and placed the records in the mputer and denied the employee access to the computer.

Between the dates of July 30, 1985 nad December 31, 1985, day Hallenbrook resigned, the employee had recieved seven written reprimand, four oral reprimands and two suspension.

Over the Labor Day week-end, Hallenbrook had to remove the computer from the office. Over the Labor Day week end Hallenbrook and Kundo barricaded the employee's desk in a corner of the office, placed a sign on the corner, reading, Do Not Disturb Mrs. Green, See Bill for Benefits. **Solitary confinement is the worse form of mental cruelty, torture that can be inflicted upon any human being.** Human Rights Art. 5.

November 1984, the employee filed complaints with the Civil service Commission, Board of Selectmen, Town Administrator and Union. The **inaction** of the officials to investigate the employee's complaint were offenses in themselves. **Ford v Revlon, Inc., No. CV-86-148-PR, 1 Indiv. Empl. Rts. Cases 1571, Ariz. Sup. Ct. 1987.**

Realizing they could not obtain justivc by any other means, the officials knowingly permitted individuals to resort to acts of inflicting emotional

distress to justify themselves with her termination. ' December 31, 1985, Mr. Hallenbrook resigned and January 1, 1986, Thomas Larkin, former Director and boss of the employee was called out of retirement. The employee's desk was immediately restored to its original position and recommended for upgrade to Senior Clerk Typist. **Denied** by Gerard Hayes, Personnel Director, reason: wait for the new director. A pretext to constructive discharge. Satterwhite v Smith, 36 F.E.P. Cases 148, 9th Cir. 1984.

May 1986, Bernard Belcastro was hired as the new Director. Second week of his tenure, he was called to the Personnel Office wherein Mr. Hayes had him re view the employee OPF. Upon return to the Veterans Office, he stooped and told the employee "Look, I heard all about you. I'm here to straighten you out. Do you understand."

The harassment that began under Hallenbrook continued into the Belcastro's term

November 4, 1986, the employee filed complaints with the civil Rights Div., Attorney's General's Office, Massachusetts Commission Against Discrimination and the Civil Service Commission. November 5, 1986, the employee was suspended for five days. On November 12, 1986, upon return to work from suspension, the employee was transferred to the Town Library without notification to herself or to the Civil Service commission.

On December 1, 1986, the Town of Brookline rece-

ieved the MCAD complaint. On december 2, 1986, Mr. belcastro and Mr. Hayes , with Mr. Hayes taking the employee by the arm, forced her down to the basement of the library, between book shelves and placed her in a suty carrel, stating "this is your new office." On December 3, 1986, the employee was suspended for five days.

On December 10, 1986, Mr. Belcastro and Mr. Hayes **demanded** the employee to sign a pre-written letter of resignation. **Gates v Life of Montana Ins. Co.,** 668 P. 2d 213, 216, No. 82-468, 1983. The employee refused and was suspended pending termination proceedings

January 27, 1987, the Town of Brookline terminated the emloyee as "unsuitable." Employee made timely appeal to the Civil Service Commission and on October 16, 1987, affirmed the termination of the employee. Employee filed judicial review in the Dedham District Court, Dedham, Ma. case no. 23869.

February 1988, the employee made application for refund of her retirement funds. March 8, 1988, Cathleen Cavell, Assoc. Town counsel, held if Mrs. Green were to voluntarily dismiss her state court lawsuits she then would recommend release of her retirement funds. June 1988, the employee dismiss her state court lawsuits. November 27, 1988, the employee filed Workmen's Compensation claims for DeQuervanes Disease and intentional infliction of emotional distress.

On or about July 14, 1990, David Turner, Town Counsel, telephoned the Green's lawyer, William Long, and stated he had found notes in his Assoc-iates files and if this case goes to trial, he would introduce them. Mr. Turner was asked, if, these notes had been presented at the termination or Civil Service hearing. Reply: **NO, did not want to upset the husband.** A pretext to force a settlement in favor of the town of Brookline and gain an advan-age in a civil matter. In re Bunston, 32 Mont. 83, 155 P 1109, 1916, A prosecuting attorney who threatened criminal prosecutions to force a settle-ment favorable to his client was disbarred.

Mr. Long withdrew from this case and the Greens retained Jonathan Levin, who appeared at Conference on March 14, 1991. After Conference, Sarah Wilson, Associate town Counsel handed Mr. Levin the alledged notes and states, if, this case goes to trail I will introduce these with a witness to testify to them. Thereafter, Mr. Levin refused to take this case.

March 30, 1991, the employee's spouse filed Motion of Order of Compensation Payment, and there were no more threats.

This case then proceeded to trail on 1/5/93, 2/9/93, 4/5/93, 4/6/93, 5/10/93, 5/12/93, 7/7/93.

On April 8, 1996, the Department of Industrial Accidents, Joellen M. D'Esti, ruled the employee had suffered a mental disability as the results of a series of events in the work place and incidents

that were not bona fide personnal actions.

CONCLUSION

The Equal Employment Opportunity Commission, Massachusetts commission Against Discrimination and the Massachusetts Civil Service Commission **do not** have jurisdiction for separating injuries that are sufficiently work related from those that are not not and, further, lack jurisdiction to determine as a matter of fact whether causal connection exists between employment and injury.

The Industrial Accident Board holds exclusive jurisdiction for separating injuries that are sufficienctly work-related from those that are not, and to determine as a matter of fact whether causal connection exists between employment and injury. Zerofski's Case, supra at 594

An employee's claim against her employer for intentional infliction of emotional distress is compensable under G.L. c. 152, 26 and common law action for such claim are barred by the exclusivity provision of G.L. c. 152, §24 and the statute of limitations toll from the date the Industrial Accident Board make their ruling.

The employee's claims against her employer that were the main thrust of intentional infliction of emotional distress are not compensable under G.L. c.

152, §26, and therefore not barred by the exclusivity provision of G.L. c. 152, §24, and common law actions for injuries not compensable under G.L. c. 152, §26, do not accrue until the date the Industrial Board rules the employee's injury was work related and causally connected to employment. The statute of limitations toll from the date the Industrial Accident Board makes it determination. This case it was April 8, 1996.

Barbara F. Green

Stanley R. Green

Stanley R. Green
100 Granger Blvd. é206
Marlboro, Ma. 01752-2847
tele: 508-460-801